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# Department of Toxic Substances Control

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September 9, 2008

Mr. Thomas Johnson
Federal Project Director
U.S. Department of Energy
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Dear Mr. Johnson:

The following responds to your August 27, 2008 letter requesting that DOE's name be removed from the draft consent order prepared by DTSC and sent to Mr. Ravnesh Amar of The Boeing Company. DTSC's latest order seeks an administrative penalty for violations of State law related to the handling of lead wastes generated during demolition and decontamination of Building 4024, a DOE-owned asset situated on land leased by DOE in SSFL Area IV. DOE asserts that it bears no responsibility for those violations and that no administrative penalty should be assessed against DOE. DOE points out that under "paragraph 31.205-15 of the Federal Acquisition Regulations, cost of fines and penalties resulting from violations of, or failure of the contractor to comply with Federal, State, local or foreign laws and regulations, are unallowable [sic]."

California Health and Safety Code, section 25187(b)(5) states that "persons subject to an order [imposing an administrative penalty] include present and prior owners, lessees, or operators of property where hazardous waste is located, present or past generators, storers, treaters, transporters, disposers, and handlers of hazardous waste, and persons who arrange or have arranged, by contract or other agreement, to store, treat, transport, dispose of, or otherwise handle hazardous waste." Health and Safety Code, section 25187(b)(5) clearly applies to DOE because DOE is at a minimum: (1) the owner of Building 4024 where the hazardous lead wastes were generated and illegally stored; (2) the lessee of the property where the hazardous lead wastes were generated; and (3) the entity that arranged for the management of hazardous lead wastes by contract or agreement with The Boeing Company.

Moreover, it is well settled with respect to violations associated with analogous federal law, the Resource Conservation and Recovery Act (RCRA), that U.S. EPA reserves the right to hold a generator, contractor and subcontractor liable in any enforcement action. (45 Fed. Reg. 72024, 72025-72026 (10/30/80)). All three parties contribute to the

generation of a hazardous waste and all three should be jointly and severally liable as generators. (Id., see also Office of Solid Waste and Emergency Response, #9451.1980(02) (11/18/80); [Definition of "generator" includes both operators and contractors who "act jointly to produce" and remove hazardous waste "subject(ing) it to regulation."]).

It is therefore entirely appropriate that DOE be named along with The Boeing Company as a respondent in the enforcement action.

Sincerely,

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